1990

State of Utah v. Lawrence Morgan : Brief of Respondent

Utah Court of Appeals

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DOCKET NO. ----------

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff-Respondent. vs. LAWRENCE MORGAN, Defendant-Appellant.	)	Case No. 900396-CA Classification Priority 2

BRIEF OF RESPONDENT STATE OF UTAH

APPEAL FROM A JUDGMENT, SENTENCE, AND ORDER OF COMMITMENT ON A CLASS B MISDEMEANOR OF ATTEMPTED PROPERTY OBTAINED BY UNLAWFUL CONDUCT FOLLOWING A BENCH TRIAL IN THE FIFTH CIRCUIT COURT FOR IRON COUNTY, STATE OF UTAH, THE HONORABLE ROBERT T. BRAITHWAITE PRESIDING.

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BRIEF OF RESPONDENT STATE OF UTAH

JURISDICTION OF THE COURT OF APPEALS

The jurisdiction of the Utah Court of Appeals is established by Utah Code Ann. §78-2a-3(2)(d) (1990).

NATURE OF THE PROCEEDINGS

This is an appeal from a conviction of a Class B Misdemeanor, Attempted Property Obtained by Unlawful Conduct, in violation of Utah Code Ann. § 76-6-506.4 (1990).

ISSUES PRESENTED ON APPEAL

1. Was the trial court's verdict clearly erroneous or against the clear weight of the evidence?

Utah R. Civ. P. 52(a)
State v. Strieby, 790 P.2d 98 (Utah Ct. App. 1990)

2. Did Defendant signing the property receipt constitute a substantial step toward commission of the offense?

Utah Code Ann. § 76-4-101 (1990)

3. Was Defendant entrapped?

Utah Code Ann. § 76-2-303 (1990)
State v. Belt, 780 P.2d 1271 (Utah Ct. App. 1989)

DETERMINATIVE RULES AND STATUTES

Utah R. Civ. P. 52(a):

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

Utah Code Ann. §76-2-303(1) (1990):

> It is a defense that the actor was entrapped into committing the offense. Entrapment occurs when a law enforcement officer or a person directed by or acting in cooperation with the officer induces the commission of an offense in order to obtain evidence of the commission for prosecution by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

Utah Code Ann. § 76-4-101 (1990):

> (1) For purposes of this part a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense.
>
> (2) For purposes of this part, conduct does not constitute a substantial step unless it is strongly corroborative of the actor's intent to commit the offense.
>
> (3) No defense to the offense of attempt shall arise:
>
> (a) Because the offense attempted was actually committed; or
>
> (b) Due to factual or legal impossibility if the offense could have been committed had the attendant circumstances been as the actor believed them to be.

Utah Code Ann. § 76-6-506.4 (1990):

> It is unlawful for any person to receive, retain, conceal, possess, or dispose of personal property, cash, or other form representing value, if he knows or has reason to believe the property, cash, or other form representing value has been obtained through unlawful conduct described in Section 76-6-506.1, 76-6-506.2, or 76-6-506.3.

STATEMENT OF THE CASE

NATURE OF THE CASE

Defendant appeals from a Judgment, Sentence, and Order of Commitment entered against him after his conviction of Attempted Property Obtained by Unlawful Conduct, a Class B Misdemeanor, in the Fifth Circuit Court, the Honorable Robert T. Braithwaite presiding.

COURSE OF THE PROCEEDINGS

Defendant was originally charged with one (1) count of Property Obtained by Unlawful Conduct, a Class A Misdemeanor, in

violation of Utah Code Ann. § 76-6-506.4 (1990). Defendant filed a notice of entrapment defense, which motion was heard on May 30, 1990. The court denied Defendant's claim of entrapment. A bench trial was held July 31, 1990.

DISPOSITION AT TRIAL COURT

The trial court found Defendant guilty of Attempted Property Obtained by Unlawful Conduct, a Class B Misdemeanor. Defendant waived his time for sentencing and was sentenced to a concurrent six- (6-) month jail sentence.

STATEMENT OF FACTS

During the months of August through November, 1989, Defendant Lawrence Morgan was a state inmate serving time at the Iron County/Utah State Correctional Facility. (Trial T. 101) On August 11, 1989, fellow state inmate John Maycock, as part of an extensive fraudulent credit card number scheme, ordered five (5) pairs of athletic shoes from the ZCMI store in Sandy, Utah, for five (5) inmates, including Defendant. (Trial T. 56, 62; Exhibit P-3) Although not challenged at trial (Trial T. 79, 122) or on appeal (Appellant's Brief 3, 4), the fraudulent nature of the transaction was established by the testimony of ZCMI personnel (Trial T. 7, 13), American Express personnel (Trial T. 14), a United States Secret Service agent (Trial T. 42), unwitting victims of telephone fraud (Trial T. 46), and fellow inmates (Trial T. 56, 62). In sum, inmate Maycock, through some system, created valid but unissued credit card numbers, telephoned area merchants, and ordered merchandise under a false name and address to be delivered to the facility as gifts for himself and other

inmates. Once the subject shoes arrived, they, along with several other items, were seized pursuant to an investigation by the Utah Department of Corrections and the United States Secret Service.

Shortly after the August 11 transaction, inmate Maycock spoke with Defendant, informed him of his fraudulent scheme and asked Defendant for legal information. (Trial T. 74, 102) Defendant complied. After spending a period of time in lockdown, inmate Maycock returned to Defendant and notified him that he, Defendant, may be charged because inmate Maycock had ordered him a pair of shoes. (Trial T. 74, 102) Sometime between the August 11 transaction and November 8, 1989, Defendant also questioned fellow inmate Warren Sandovall regarding inmate Maycock's ordering of shoes. (Trial T. 64) Furthermore, during the same time period, Correctional Officer Aleta Bowman told Defendant on at least two (2) occasions that a pair of shoes delivered for him had been seized pursuant to the investigation. (Trial T. 22) However, when interviewed by investigators on November 9, 1989, Defendant denied any knowledge of any credit card fraud. (Trial T. 43)

On November 8, 1989, Officer Bowman, under the direction of the United States Secret Service, the Utah Department of Corrections, and the Iron County Attorney's Office, presented property receipts for the seized items to several inmates, including Defendant. (Trial T. 22) Officer Bowman told Defendant (again) and others that the property had been seized, that she did not know if they would receive it, but if they wanted the

property, they needed to sign the receipt. (Trial T. 24, 30) Defendant signed his receipt for the pair of shoes. (Trial T. 24, 30; Exhibit P-2) The receipt states "Inmate assumes full responsibility for the property listed." (Exhibit P-2)

Defendant was charged with one (1) count of Property Obtained by Unlawful Conduct, a Class A Misdemeanor, in violation of Utah Code Ann. §76-6-506.4 (1990). (R. 1) Defendant filed a notice of entrapment defense, which was heard May 30, 1989. (R. 24; Entrapment Hearing Transcript) The court, after hearing testimony of Defendant, Officer Bowman, and arguments, took the motion under advisement. (Entrapment T. 35)

At the pretrial conference on June 6, 1990, the court ruled on the entrapment issue as follows:

> [T]he Court cannot find that the Defendant was entrapped. Finds the police merely afforded the Defendant an opportunity to commit the offense, the conduct was not induced by persistent request of the police, Aleta Bowman, extreme pleas of desperate illness, pity, inordinate sums of money, et cetera. And, in fact, the officer told the Defendant that the property was seized pursuant to an investigation at the time it was signed for.

(Pretrial T. 2)

A bench trial was held July 13, 1990. After hearing the evidence and arguments, the court found Defendant guilty of the lesser-included offense of Attempt to Obtain Property by Unlawful Conduct, a Class B Misdemeanor. (Trial T. 126) The court found beyond a reasonable doubt the property was fraudulently obtained

and that Defendant was so aware. (Trial T. 126) However, in reducing the offense, the court stated:

> But I don't find that the Defendant actually took possession or constructive possession. I don't find that he--beyond a reasonable doubt, that he exercised control. We don't have a similar agency situation to the cases cited in the outline for the usual business relationship or co-defendant relationship. We have a situation where its a jailer or a guard to an inmate situation. I think its different from possession ownership of a person arrested who has it on their property when they are taken into the facility.

(Trial T. 126)

At counsel for Defendant's request, the court reiterated its findings against the entrapment defense:

> And for the same reasons I believe I stated on the record earlier, the Court has not found that the Defendant was entrapped. The opportunity was afforded him and he took that opportunity to sign for the property, the shoes, but the entrapment motion was denied and the Court did not find that the Defendant was entrapped in this case for the reasons stated earlier on the record. I haven't seen anything in the evidence today that would change the earlier ruling.

(Trial T. 127-128) Defendant waived his time for sentencing and was immediately sentenced to a six- (6-) month concurrent jail sentence.

SUMMARY OF ARGUMENT

The trial court's verdict was not clearly erroneous or against the clear weight of the evidence. Defendant was not entrapped into committing the offense charged.

ARGUMENT

POINT I

AMPLE EVIDENCE WAS PRESENTED TO SUPPORT THE TRIAL COURT'S GUILTY VERDICT. THEREFORE, THE VERDICT WAS NOT CLEARLY ERRONEOUS AND SHOULD NOT BE OVERTURNED ON APPEAL.

In order to reverse the guilty verdict entered by a trial court, this Court must conclude the verdict was "clearly erroneous." Utah R. Civ. P. 52(a). In other words, this Court must conclude the verdict was "against the clear weight of the evidence, or . . . otherwise [reach] a definite and firm conviction that a mistake has been made[.]" State v. Strieby, 790 P.2d 98, 100 (Utah Ct. App. 1990) (quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987)).

The elements of the offense charged are as follows:

1. Defendant received, retained, concealed, possessed, or disposed of personal property;

2. Defendant knew or had reason to believe the property had been obtained by the unlawful conduct of purchasing or attempting to purchase property by the use of a false or fictitious credit card number;

3. The property had a retail value of less than two hundred fifty dollars ($250); and

4. The events occurred on November 8, 1989, in Iron County, State of Utah.

The trial court found the evidence established all the elements beyond a reasonable doubt but for the first. The trial court could not find beyond a reasonable doubt that Defendant received or possessed the property. (Trial T. 126) Apparently, the trial court, in entering a guilty verdict for the lesser-included offense of Attempted Property Obtained by Unlawful Conduct, found

that Defendant's signing the property receipt constituted an attempt, or a "substantial step" to commit the offense charged. Utah Code Ann. 76-4-101 (1990).

Defendant does not challenge the trial court's findings as to the third or fourth elements. Nor does Defendant challenge the court's finding as to the second portion of the second element, namely the unlawful nature of the purchase or attempted purchase. Defendant does challenge the trial court's findings as to element one and the first part of element two, namely Defendant's mental state and his attempted receipt or possession of the property.

Defendant claims the only evidence that Defendant "had any contact with this particular pair of shoes was the conversation that he had with Aleta Bowman at the time of the execution of the Property Receipt." (Appellant's Brief 4) That is a false statement. In addition to Officer Bowman's conversation with Defendant wherein she again informed him the property had been seized (Trial T. 24, 30), there is more than sufficient evidence to support the second element, whether Defendant knew or had reason to believe the property had been unlawfully obtained. Officer Bowman told Defendant on at least two prior occasions that the shoes had been seized pursuant to the investigation. (Trial T. 22) Defendant himself, both at the entrapment hearing and at trial, testified that inmate Maycock advised him of his criminal scheme, that Defendant provided information and advice, and that inmate Maycock told him well prior to November 8 that he

had ordered Defendant a pair of shoes. (Entrapment T. 17-18; Trial T. 74, 102) Inmate Sandovall testified he had a conversation with Defendant regarding inmate Maycock's ordering shoes. (Trial T. 64) Defendant's culpable mental state is further established by his dishonest denial of any such knowledge when interviewed by investigators. (Trial T. 43) Clearly there is sufficient evidence to support the court's findings as to Defendant's mental state.

Regarding the first element, Defendant's attempted receipt or possession of the property, Defendant's challenge is couched more in terms of Defendant's mental state rather than whether or not Defendant's conduct constituted an attempt to commit the offense charged. Clearly, under the facts of this case, Defendant's signing of the property receipt constituted an attempt or a substantial step to commit the greater offense of actual receipt or possession. Defendant was familiar with the property receipt. (Entrapment T. 10-11) It was the standard document used for inmates to receive property. The receipt states "Inmate assumes full responsibility for the property listed." (Exhibit P-2) Officer Bowman told Defendant, just prior to his signing, that she did not know whether he would receive it or not, but that if he wanted the property, he had to sign. (Trial T. 24, 30) Defendant willingly signed. Defendant's signing of the document was "strongly corroborative of [his] intent to commit the offense." Utah Code Ann. § 76-4-101(2) (1990). Therefore, it constituted a substantial step, or an attempt, to commit the offense.

To rebut the State's clear weight of evidence, Defendant offered the testimony of Defendant and two other inmates. Defendant, a convict of numerous felonies, testified that when Officer Bowman presented the property receipt, she told him she would deliver the shoes. (Trial T. 107) He also testified that after inmate Maycock informed him of the shoe order, he, together with fellow inmate Ron Gier, inquired of Officer Bowman three or four times whether he had received any property, to which Officer Bowman responded in the negative. (Trial T. 104) Defendant also testified he assumed the pair of shoes he signed for was a birthday gift from his sister. (Trial T. 107) His birthday was September 18. (Trial T. 104) Inmate Martin Hernandez, a thrice-convicted felon, testified consistent to Defendant's version of the November 8 conversation. (Trial T. 89-90) Inmate Gier, also a thrice-convicted felon, testified consistently with Defendant's testimony. (Trial T. 96-98) Officer Bowman refuted all three inmates' testimony. (Trial T. 25)

Evidence provided by Defendant did not rebut the clear weight of the evidence as presented by the State. As Rule 52(a) states, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." See also State v. Wright 744 P.2d 315 (Utah Ct. App. 1987) Obviously, the trial court found Officer Bowman and the other State's witnesses to be far more credible than Defendant's convict witnesses. Nothing in the trial transcript or the rest of the appellate record can support a determination by this Court that the trial

court's verdict was clearly erroneous or against the clear weight of the evidence.

POINT II

OFFICER BOWMAN'S ACTIONS DID NOT CONSTITUTE ENTRAPMENT. DEFENDANT WAS MERELY AFFORDED AN OPPORTUNITY TO COMMIT THE OFFENSE.

Defendant claims he was entrapped because "[Officer] Bowman's methods created a substantial risk that the offense would be committed--if this was, in fact, the commission of an offense--and without her efforts, no offense could have been committed." (Appellant's Brief 7) Defendant does not specify which methods he targets as being suspect.

As stated by Defendant, the entrapment defense is set forth in Utah Code Ann. § 76-2-303(1) (1990):

> Entrapment occurs when a law enforcement officer or a person directed by or acting in cooperation with the officer induces the commission of an offense in order to obtain evidence of the commission for prosecution by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

In State v. Belt, 780 P.2d 1271 (Utah Ct. App. 1989), this Court accurately summarized Utah case law on the issue of entrapment. As stated in Belt, Utah adopts the objective test for entrapment which focuses on "whether police conduct used in obtaining evidence of the commission of an offense rose to the level of inducement or persuasion that would effectively persuade the average person to commit the offense." Id. at 1274 (citing State v. Taylor, 599 P.2d 496 (Utah 1979)). Examples of improper police inducement are persuasion, depending upon the individual

circumstances, including extreme pleas of sympathy, desperate illness, pity, or close friendship, or offers of inordinate sums of money. Belt, 780 P.2d at 1274 (quoting Taylor, 599 p.2d at 503).

If the trial court had believed Defendant and his fellow convicts that Officer Bowman lied by saying she would bring the property right away, then perhaps such conduct would have constituted entrapment. But that is not the issue here. The trial court is free to believe whomever he chooses according to his honest convictions. He chose to believe Officer Bowman. (Pretrial T. 2; Trial T. 127-128) The Court, apparently referring to Belt and Taylor, specifically found Defendant's conduct was not induced by persistent requests, desperate pleas, or cash offers by Officer Bowman. (Pretrial T. 2) Officer Bowman's testimony clearly supports such a finding. She expressly told Defendant and the other inmates that the property had been seized, that she was not sure they would receive it, but that if they wanted it, they needed to sign. In fact, one inmate refused to sign. (Trial T. 24, 30) As the trial court stated, "The opportunity was afforded [Defendant] and he took that opportunity[.]" (Trial T. 127-128) Under section 76-2-303, that is not entrapment.

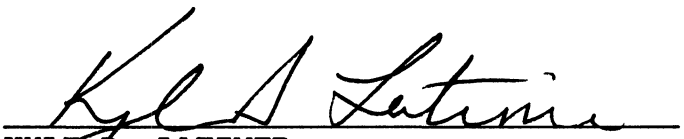
CONCLUSION

In conclusion, the State of Utah respectfully asserts that the clear weight of the evidence at trial was in support of the trial court's verdict. Therefore, the verdict was not clearly erroneous and should not be overturned on appeal. Furthermore,

the State of Utah respectfully asserts that Officer Bowman's conduct was in all aspects proper and that she merely afforded Defendant an opportunity to commit an offense, which opportunity he willingly accepted. Therefore, he was not entrapped. The State of Utah respectfully requests that this Court affirm Defendant's conviction.

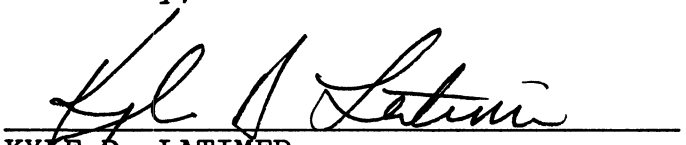
DATED this 6 day of February, 1991.

SCOTT M. BURNS
Iron County Attorney

By: 
KYLE D. LATIMER
Chief Deputy Iron County Attorney
for Respondent State of Utah

MAILING CERTIFICATE

I HEREBY CERTIFY that I mailed four (4) true and correct copies of the foregoing BRIEF OF RESPONDENT STATE OF UTAH to Mr. James M. Park, Esq., Attorney for Respondent, P.O. Box 765, Cedar City, Utah 84721-0765, by first-class mail, postage fully prepaid, on this 6 day of February, 1991.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